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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. STEPHON LEE et al., Defendants and Appellants.	A151330 (Alameda County Super. Ct. Nos. 176746A & B)

Stephon Lee and Mario Mady Floyd were convicted by jury of first degree felony murder, with robbery-murder special circumstance findings.[1] Both contend the trial court erred by not sua sponte instructing on second degree murder. Floyd additionally claims a pretrial statement by one of the witnesses should have been suppressed as involuntary, the jury instructions on felony murder as to an aider and abettor were incomplete, the robbery-murder special circumstance finding as to him is not supported by the evidence and his felony-murder conviction is likewise not supported by sufficient evidence.

As to Lee, who was the actual killer, we conclude any error in failing to instruct on second degree murder was harmless given the special circumstance finding as to him, which he has not challenged on appeal. However, we conclude the matter must be

[1] As to Lee, the jury also found true numerous other enhancements and also convicted him of being a felon in possession of a firearm—none of which Lee challenges on appeal.

remanded to allow the sentencing court to consider whether to strike the firearm enhancement under amended Penal Code section 12022.53, subdivision (h).[2]

As to Floyd, who was convicted of felony murder as an aider and abettor, we conclude the trial court did not err in allowing the challenged evidence nor did it commit instructional error. However, we conclude that under the explication of the special circumstances law as to aiders and abettors in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), the evidence is insufficient to support the robbery-murder special circumstance finding as to Floyd. While we agree our conclusion as to the special circumstances finding calls into question his felony-murder conviction in light of the recent changes to the felony-murder law, we conclude, as have other appellate courts, Floyd must seek to vacate his conviction in the trial court pursuant to new section 1170.95.

BACKGROUND[3]

On a summer afternoon in 2013, Judy Salamon drove down a neighborhood street in Oakland, stopped her car, got out, and took cell phone photos or video in the direction of a car then being driver by Lee.

Floyd, who was in the passenger seat of Lee's car, exited the car. Shortly thereafter, he confronted Salamon and demanded she turn over her cell phone. When she refused, he spit on and then threw a garbage can at her car.

Apparently Lee had gotten out of his car, and after Floyd failed to procure the cell phone, one witness stated Lee had words with Floyd to the effect that " 'It should've been done with.' " According to another witness, as Lee exited his car, he told Floyd he was "about to go get the phone." Several witnesses said Lee then walked over to Salamon's car and shot her in the head. Another witness told officers that after Floyd returned to

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] We provide only a brief overview of the case here. We discuss the testimony, which varied greatly depending on the witness, in greater detail in our discussion of the issues on appeal.

Lee's car, Lee pulled alongside Salamon's car and fired shots through the passenger side window of his car into Salamon's car, one of which struck her in the head.

Witnesses saw Lee's car start up the street, but shortly make a U-turn, drive back down the street, and stop. Witnesses differed as to whether Lee or Floyd was driving at the time, and also differed as to whether it was Lee or Floyd who exited the car, reached into Salamon's car, snatched her cell phone, and hopped back into the car. Floyd's DNA, however, was found under Salamon's fingernails.

Around the same time, a masonry contractor who was working nearby, overheard the shooting, went to Salamon, and found her bleeding in her car. A police officer soon arrived, and found Salamon sitting in the driver's seat of her car, slumped over and bleeding from her head. She was still breathing and had a pulse. The officer and a nurse who happened to be nearby removed Salamon from her car and attended to her until paramedics arrived. Despite efforts by the paramedics, Salamon died at the scene.

When Lee was arrested, he had a cell phone containing a photograph of Salamon's cell phone with a reflection of someone wearing a Falcon's hat, which one witness described Lee as wearing at the time of the shooting. Metadata for both photographs established they were taken about the same time as the murder.

The jury convicted Lee of one count of murder (§ 187, subd. (a)) and one count of a felon in possession of a firearm (§ 29800, subd. (a)(1)). In conjunction with the murder conviction, the jury found he personally and intentionally discharged a firearm causing great bodily injury or death (§§ 12022.7, subd. (a), 12022.53, subd. (d)), personally inflicted great bodily injury (§ 12022.7), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)), and murdered Salamon while committing robbery (§ 190.2, subd. (a)(17)(A)).

The jury convicted Floyd of one count of murder (§ 187, subd. (a)). It further found that he was armed with a firearm in the commission and attempted commission of

the felony murder (§ 12022, subd. (a)(1))[4] and the murder was committed during a robbery (§ 190.2, subd. (a)(17)(A)).

DISCUSSION

Issues Raised by Floyd

Evidentiary Ruling: Admissibility of Jordan's Statement to the Police

Approximately three months after the shooting, Police Sergeants Gantt and Fleming interviewed Carmelita Jordan over a nearly five-hour period.

At trial, when Jordan claimed she could not recall her prior statements to the officers, the prosecution sought to introduce an audiotape of the interview into evidence. Floyd objected on the ground Jordan's statements had been coerced. After listening to the entire audiotape, the trial court overruled Floyd's objection and admitted a portion of the audiotape into evidence. Floyd maintains the court erred in admitting any part of the audiotape.[5]

Jordan was interviewed at the police station. She was not under arrest, and the door to the interview room was unlocked and at times open. At one point during the interview, Jordan stormed out of the door, but later returned and closed the door herself. There is no indication her mental or physical capabilities were impaired in any way, such that she was "incapable of free or rational choice." (*In re Cameron* (1968) 68 Cal.2d 487, 498.)

There is no question Jordan was hostile at the outset of the interview. She repeatedly insisted she would not testify. She swore. She was angry and threw chairs. In fact, at trial, Jordan agreed with the prosecutor's description that she had thrown a tantrum.

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[4] This was not a finding Floyd personally possessed a gun, but was an "arming" enhancement based on Lee's possession and use of a firearm.

[5] While we independently review the trial court's determination of voluntariness, considering the record in its entirety and accounting for the characteristics of the accused and the details of the encounter, we defer to the trial court's factual findings if supported by substantial evidence. (*People v. Jablonski* (2006) 37 Cal.4th 774, 814.)

Frustrated with Jordan's behavior, Sergeant Gantt explained she was a witness to the events and she could choose to cooperate or be hostile: "And so—listen to me. So you either gonna be—there's two types of witnesses, there's a witness that voluntarily comes forward and tells what they s—they saw, and there's a hostile witness. Hostile witnesses get warrants put out for their arrest, and hostile witnesses get put in jail. That's what happens with hostile witnesses. So you're gonna have to decide to. . . ." Jordan responded, "All right, what do you want me to do . . . [¶] . . . [¶] 'cause I'm not goin' to jail." Sergeant Gantt repeated, "when we leavin' here today, you're gonna have to decide how you w—how you wanna be. [¶] . . . [¶] So tell me what you saw, tell me what happened." Jordan said she wanted to go home, so she would admit "[h]e did it." But she refused to sign anything to that effect. Sergeant Gantt tried to calm her down, saying he was not going to force her to sign anything and asking her, again, to tell him what happened. Jordan continued to insist Lee and Floyd were just "hangin' out" and that she heard a loud boom as she was getting into her car, but did not see anything.

Sergeant Gantt then asked Jordan how old her child was. Jordon shot back, "None of your fucking God damned business." Taken aback, Sergeant Gantt told Jordan, "I'm not gonna to do anything to your child." The following colloquy ensued:

> "[Jordan:] Okay, well, then I don't . . .
>
> "[Gantt:] What I'm asking you is—is that you better [not] put yourself in a situation to where you're gonna be taken away from your child. If they put a warrant out for you're arrest you . . . because you are what's called a hostile witness. You're being very hostile right now.
>
> "[Jordan:] 'Cause I want to go home.
>
> "[Gantt:] You're bein' hostile with me. You're bein' hostile with me and you're not tellin' me what happened out there. (Unintelligible.)
>
> "[Jordan:] I didn't see anything though. You guys are askin' me and I heard, I didn't see nothin'.
>
> "[Gantt:] You say you heard a loud—loud boom?

"[Jordan:] Yes, and then—then I left."[6]

Jordan continued to insist she had not seen anything and she did not know anything. Sergeant Gantt, in turn, continued to ask her what had actually happened. He made it clear—"I'm not threatin' you. I would never do that to you. I don't threaten people. You know, all I'm sayin' is is that you should do the right thing. So I mean, you. . . ." At that point, Jordan, referring to Lee, said: "He shot the lady. [¶] . . . [¶] He fucking shot the lady. Are you happy? He shot her. He's the one with attitude." She went on to say it had all happened "so fast" and she heard three gunshots. Jordan then said she wanted to go home, tore up the photographs on the table in front of her, and reiterated that she did want to be a witness. Sergeant Gantt again said he could not make her do anything she did not want to do.

Over 10 minutes later, after Jordan had, on her own, walked out of the interview room and then returned, she demanded that the officers put their phones away, not take any notes, and turn off the cameras. The officers agreed and said there were no cameras in the room.

Jordan then said that after the gunshots, she saw Lee run up the hill. She did not see the gun, but believed it was hidden in his hoodie. She insisted neither Floyd nor Rutherford was involved in the shooting. There were two other men at the scene, possibly "Mark" or "Mikey." She had heard some arguing before the shooting, and had seen the "lady" driving around, swearing and arguing with the men. Jordan went on to say she was close friends with Floyd and Rutherford and "super-protective over these boys. They're my babies." Lee, on the other hand, she disliked.

Jordan initially stated one of the men had thrown a garbage can at the "lady's" car, and it could have been Floyd. She later acknowledged Floyd was "technically" there and had picked up the garbage can and thrown it. She had told Floyd, " '[y]ou need to take

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[6] During her testimony at trial, Jordan claimed the officers told her Child Protective Services (CPS) could take her child if she went to jail for being a hostile witness. The transcript shows that is not what the officers said, and the parties later stipulated the officers never used the term CPS during Jordan's interview.

your ass in the house and leave that lady alone.' " Jordan was aware the "lady" was trying to take photos with her cell phone, and also saw Floyd tell the "lady," " '[g]ive me the phone.' " Jordan did not know who ultimately took the cell phone, but knew one of them (Lee or Floyd) had taken it.

Jordan said Floyd had spit on either the windshield or hood of the "lady's" car, so his DNA should be on it and that should be "enough" evidence for the police. Once Jordan realized what was actually happening in the street, Floyd warned her to " '[m]ind your business' " and sped off in the car. When asked, again, about the sequence of events, Jordan said Floyd had argued with "the lady," spit on the car, and thrown the garbage can.

By the end of the interview, Jordan was laughing and joking with the officers.

A criminal defendant has standing to prevent the use of involuntary third-party statements at trial and bears the burden of demonstrating coercion. (*People v. Badgett* (1995) 10 Cal.4th 330, 344.)

" ' " 'A statement is involuntary if it is not the product of ' "a rational intellect and free will." ' " ' " (*People v. Duff* (2014) 58 Cal.4th 527, 555.) "In assessing whether statements were the product of free will or coercion, we consider the totality of the circumstances, including ' " 'the crucial element of police coercion,' " ' the length, location, and continuity of the interrogation, and the defendant's maturity, education, and physical and mental health." (*Id.* at pp. 555–556.)

" ' " 'The question posed . . . in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were 'such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.' " ' " (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1212, quoting *People v. Thompson* (1990) 50 Cal.3d 134, 166.) If the pressure or inducement was "a motivating cause" of the decision to confess, the confession is involuntary and inadmissible as a matter of law. (*People v. Brommel* (1961) 56 Cal.2d 629, 632, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510.)

Coercive police conduct—whether physical or mental, express or implied—is a necessary predicate for a finding of involuntariness, but it does not alone compel a finding that a resulting statement was coerced. (*People v. Hensley* (2014) 59 Cal.4th 788, 812; *People v. Trout* (1960) 54 Cal.2d 576, 583, overruled on other grounds in *People v. Cahill*, *supra*, 5 Cal.4th at p. 510.)

Floyd claims Sergeant Gantt's explanation of the consequences of being a hostile witness constituted a direct threat to Jordan to answer his questions, and if she did not, she would be arrested and her child would be taken away.

Floyd is correct that the courts have condemned interrogations where the police threaten to arrest or punish a close relative, or promise to free a close relative, in exchange for a confession. (See *People v. Trout*, *supra*, 54 Cal.2d at pp. 584–585.)

However, Floyd reads more into a small fraction of Jordan's interview than is warranted. Sergeant Gantt did not threaten to arrest Jordan and have her child removed from her if she refused to talk to the officers. What Sergeant Gantt made plain to Jordan was that she was a witness, she would be called to testify, and she had a "choice" to either testify voluntarily or to remain a "hostile" witness and, if she remained such, she would be subpoenaed and, if she refused to appear or to testify, she could be jailed and, if that were to happen, she could not take care of her child. Sergeant Gantt was not in error in anything he said. (See *People v. Partee* (2018) 21 Cal.App.5th 630, 643 [discussing the procedures pertaining to subpoenaed witnesses who refuse to testify].)

The cases on which Floyd relies are readily distinguishable. In *Lynumn v. Illinois* (1963) 372 U.S. 528, for example, an officer told the defendant if she did not cooperate, her government aid would be cut off and her children would be taken away. (*Id.* at pp. 530–534.) In *United States v. Tingle* (9th Cir. 1981) 658 F.2d 1332, an officer told a bank robbery suspect she faced a lengthy prison sentence, she had " 'a lot at stake,' " and if she went to prison she might not see her child. (*Id.* at pp. 1333–1334.) In *People v. Trout*, *supra*, 54 Cal.2d at page 584, officers, without any grounds, arrested and detained the suspect's wife for hours, releasing her when her husband confessed. Sergeant Gantt's exchange with Jordan about remaining a hostile witness was not the same in tenor or in

tone. In fact, Sergeant Gantt affirmatively assured Jordan "I'm not gonna do anything to your child." And, for the remainder of the interview there was no mention whatsoever of her child.

Not only did Sergeant Gantt not engage in any coercive conduct, but it is apparent from the entirety of the interview, that Jordan's later statements were not the product of even a perceived threat. On the contrary, after Sergeant Gantt pointed out the potential consequences of refusing to testify, Jordan *continued* to maintain that at the time of the crimes she was taking care of her own affairs and had not seen anything. It was only after Sergeant Gantt continued to state that was not what other witnesses had said, asked her to do the "right thing," and painstakingly followed up with questions about the few details Jordan had related, that she provided more details about what she had seen and heard. And while Jordan stated numerous times, particularly while she was refusing to provide any information, that she wanted to go home, she was by no means prevented from doing so. Indeed, she at one point got up and left.

In sum, sufficient evidence supports the trial court's finding that, "Ms. Jordan was a chameleon in many respects. And I don't think that despite the histrionics, that anybody would see reviewing that statement who were present that there would be any basis for finding that her statement was coerced or that it led to her testimony being coerced." Accordingly, the trial court did not err in admitting portions of the audiotape of Jordan's statement to the police.

Instructional Rulings:

Aider and Abettor Felony-Murder Instruction

Floyd contends the instructions on aider and abettor liability for felony murder were deficient in that "they failed to tell the jury that he must have been 'jointly engaged' with Lee [in committing a robbery] before the fatal shot was fired." Floyd bases this claim of instructional error on *People v. Pulido* (1997) 15 Cal.4th 713 (*Pulido*) and *People v. Hill* (2015) 236 Cal.App.4th 1100 (*Hill*). As we discuss in connection with other claims of error, since the briefs on appeal were filed in this case, the Legislature has made significant changes in the law on aider and abettor liability for murder.

Accordingly, as the law now stands, the instructions on aider and abettor liability for felony murder given during trial are incorrect. We nevertheless address the claim of instructional error Floyd advances in his briefs in light of our conclusion, discussed *infra*, that he must pursue the petition remedy set forth in section 1170.95 to vacate his felony murder conviction under the new law.[7]

In *Pulido*, the Supreme Court addressed the extent of aider and abettor liability for robbery felony murder: "If one person, acting alone, kills in the perpetration of a robbery, and another person thereafter aids and abets the robber in the asportation and securing of the property taken, is the second person guilty of first degree murder under section 189?" (*Pulido, supra*, 15 Cal.4th at p. 716, italics omitted.) The answer, said the court, was "no." "Although the second person is an accomplice to robbery [citation], such participation in the robbery does not subject the accomplice to murder liability under section 189, because the killer and accomplice were not 'jointly engaged at the time of such killing' in a robbery [citation]; the killer, in other words, was not acting, at the time of the killing, in furtherance of a 'common' design to rob [citation]." (*Ibid.*; see *id*. at p. 722 [an "accomplice's liability for any homicide committed in furtherance of a 'common purpose' [citation] or 'common design' [citation] of robbery patently does not include a killing that preceded any agreement or intent to participate in the robbery. . . ."].)

The court went on to explain that the standard CALJIC instructions then in use for felony murder (CALJIC No. 8.27 (1996 ed.)) and for aider and abettor liability (CALJIC 9.40.1 (1996 ed.)), together, "could well suggest to a jury that a person who aids and abets only in the asportation phase of robbery, after the killing is complete, is nonetheless guilty of first degree murder under the felony-murder rule." (*Pulido, supra*, 15 Cal.4th at p. 728.)

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[7] We review Floyd's claim of instructional error de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569–570.)

To rectify this problem in cases where there is substantial evidence the defendant did not join in the robbery until after the killing occurred, the court suggested several possible modifications to these CALJIC instructions: "One proper manner of modifying CALJIC No. 8.27 to limit the liability of late joiners, therefore, would be to insert in the instruction the following italicized phrase: 'If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of—, all persons, who either directly and actively commit the act constituting that crime, or who, *at or before the time of the killing*, with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional or accidental.' Alternatively, CALJIC No. 8.27 could be qualified by telling the jury directly, through a separate supplemental instruction, that the rule of liability described in the instruction does not apply to a person who aids and abets the perpetrator of the crime only after the killing has been completed." (*Pulido, supra*, 15 Cal.4th at p. 729.)

The high court did not, however, decide whether the instructions given in *Pulido* should have been so modified. Rather, the court concluded any error in the instructions was harmless given the robbery-murder special circumstance finding. (*Pulido, supra*, 15 Cal.4th at p. 726.) "Specifically, the jury was instructed that the robbery-murder special-circumstance allegation could not be found true unless defendant was engaged in the robbery at the time of the killing. In a modified form of CALJIC No. 8.80.1 (1990 new), drawn directly from the statutory language defining the special circumstance (§ 190.2, subd. (a)(17)), the jury was directed to determine whether or not 'the murder was committed *while the defendant was engaged or was an accomplice in*' robbery, attempted robbery or the immediate flight from a robbery. (Italics added.) In the special circumstance verdict, consistent with this instruction, the jury found 'that the said defendant, Michael Robert Pulido, engaged in or was an accomplice in the commission of or attempted commission of robbery *during the commission of crime charged in count 1*

[murder].' (Italics added.) By its special circumstance verdict the jury thus found—explicitly, unanimously and necessarily—that defendant's involvement in the robbery, whether as direct perpetrator or as aider and abettor, commenced before or during the killing of Flores." (*Pulido,* at pp. 726–727, italics omitted.)

In *Hill*, the Court of Appeal applied the principles set forth in *Pulido* and concluded the standard CALJIC instructions were inadequate because there was evidence the alleged aider and abettor did not become involved in the perpetrator's criminal conduct until after the killing occurred. (*Hill, supra,* 236 Cal.App.4th at pp. 1118, 1121.) That this had not been the defense theory at trial (the defendant had maintained she had no involvement at all in the crimes) was immaterial, said the court, given that the evidence also suggested that if the defendant had any involvement at all, it was only after the killing. (*Id.* at pp. 1117–1118.) The appellate court thus concluded the trial court had a sua sponte duty to modify the standard CALJIC instructions along the lines suggested in *Pulido.* (*Id.* at p. 1121.) Because the special circumstance allegation *had been dropped* and thus there was no special circumstance finding, the court further concluded the failure to modify the instructions was prejudicial. (*Id.* at pp. 1119–1122.)

Here, the trial court here gave CALCRIM instructions materially different from the CALJIC instructions at issue in *Pulido* and *Hill.* It gave a tailored version of CALCRIM 540B, requiring that:

> "1. The defendant [Floyd] *committed or aided and abetted* a robbery;
> "2. The defendant *intended* to commit or intended to aid and abet the perpetrator in committing robbery;
> "3. If the defendant did not personally commit robbery, then a perpetrator, whom the defendant was aiding and abetting, committed robbery;
> "And 4. While committing robbery, the perpetrator caused the death of another person.
> "The person may be guilty of felony murder even if the killing was unintentional, accidental or negligent. To decide whether the defendant committed robbery, please refer to the separate instructions that I will give you on that crime. If you decide whether a defendant aided or abetted a crime, please refer to the separate instructions that I have given you on aiding and abetting. *If you find that the defendant Mario Floyd had not formed an intent to rob Judy Salamon, nor had formed an intent to aid and abet the perpetrator in robbing Judy Salamon until*

> *after the perpetrator killed her, then you are instructed that Defendant Mario Floyd may not be found guilty of murder under the theory of felony murder*. You may not find the defendant guilty of felony murder unless all of you agree that the defendant or a perpetrator caused the death of another. You do not all need to agree, however, whether the defendant or a perpetrator caused the death." (Italics added.)

The italicized language specifically addressed the problem identified in *Pulido.* As the CALCRIM No. 540B bench notes state: "If there is evidence that the defendant did not form the intent to commit the felony until after the homicide, or did not join the conspiracy or aid and abet the felony until after the homicide, the defendant is entitled on request to an instruction pinpointing this issue. [Citations.] Give the bracketed sentence that begins with 'The defendant must have (intended to commit [,/ or aid and abet,/ or been a member of a conspiracy to commit the (felony/felonies) of [insert felony] before or at the time that (he/she) caused the death].' " (CALCRIM No. 540B.) Here, the trial court used even stronger language, instructing the jury that Floyd could not be found guilty if he had not formed the intent to rob, or to aid and abet the perpetrator, until after the perpetrator killed Salamon.

Floyd therefore makes a somewhat different claim of instructional deficiency than was made in *Pulido*. He contends CALCRIM 540B requires the jury to find only that the defendant had the *intent* to aid and abet the felony (the robbery) at the time of the killing, but does not also require that the defendant have committed an *act* in furtherance of the felony as of the time of the killing. Thus, Floyd maintains "the instruction was erroneous because it failed to instruct the jury correctly on the timing of the *actus reus*."

To correct this supposed deficiency in the instruction, Floyd requested two pin point instructions, which the trial court refused to give. The first stated: " 'In order to be guilty of murder, as an aider and abettor to a felony murder, the accused aider and abettor and the killer must have been jointly engaged in the commission of the felony at the time the fatal wound was inflicted.' " The second stated: "If one person, acting alone, kills in the perpetration of a robbery, and another person thereafter aids and abets the robber in the asportation and securing of the property taken, the second person is not guilty of first

degree murder under Pen. Code § 89. The second person is an accomplice to the robbery but is not liable for the murder because the killer and accomplice were not jointly engaged at the time of such killing in a robbery; the killer, in other words, was not acting, at the time of the killing, in furtherance of a common design to rob."

The trial court did not err in refusing to give Floyd's proffered pinpoint instructions.

To begin with, Floyd's assertion that CALCRIM 540B remained deficient even with the additional language in accordance with the bench note, depends on an unreasonable reading of the instruction, particularly when read in context with the other pertinent instructions. CALCRIM 540B logically enumerates the required findings. First, that the defendant "committed or aided and abetted a robbery." Second, that the defendant "intended to commit, or intended to aid and abet the perpetrator in committing robbery." Third, that if the defendant did not personally commit robbery, then a perpetrator, whom the defendant ***was*** *aiding and abetting*, committed robbery. And, fourth, "[w]hile committing robbery, the perpetrator caused the death of another person." The italicized language reasonably conveys that the defendant must have been in the process of aiding and abetting the felony at the time of the killing. The additional paragraph, given in accordance with the bench note, emphasized this point, instructing that if the defendant did not join in the robbery, i.e., did not become an aider and abettor, until after the perpetrator killed the victim, then the defendant could not be found guilty of felony murder.

The trial court additionally gave CALCRIM No. 225, which instructed that there had to be a union of the "act or acts charged" and the requisite mental state, as well as CALCRIM No. 252, which reiterated that the felony murder count required "proof of the union, or joint operation of act and wrongful intent."

Finally, the prosecutor's and defense counsel's arguments were both consistent as to the necessity of Floyd having joined in the robbery prior to Lee's shooting Salamon. The prosecutor focused on the evidence that, before the shooting, Floyd demanded that Salamon turn over her cell phone, and when she refused, Floyd threw a garbage can at

her car. In fact, the prosecutor's theory was that Floyd "started this robbery. There's no doubt about it." Nor did it matter that Salamon's phone was not taken out of her car until after she was shot, or that it might have been Lee who actually snatched the phone—Floyd had aided and abetted the robbery at the outset by threatening Solomon to give up her phone. Defense counsel, in turn, emphasized that if Floyd had no intent to take the cell phone until after Salamon was shot, he could not, under any factual scenario, be guilty of felony murder.

The CALCRIM instructions were therefore not deficient and did not allow the jury to convict Floyd of felony murder even if he did not become an aider and abettor in the robbery until after Lee shot Salamon.[8]

Failure to Instruct On Second Degree Murder

Floyd also contends the trial court erred in failing to instruct, sua sponte, on second degree murder, a lesser included offense in the instant case under the " 'accusatory pleading test.' "[9]

Under the "accusatory pleading test," a trial court must sua sponte instruct on "a lesser offense that is necessarily included in one way of violating a charged statute when the prosecution elects to charge the defendant with multiple ways of violating the statute." (*People v. Smith* (2013) 57 Cal.4th 232, 244.) This test "does not require or depend on an examination of the evidence adduced at trial. The trial court need only examine the accusatory pleading. When the prosecution chooses to allege multiple ways of committing a greater offense in the accusatory pleading, the defendant may be convicted of the greater offense on any theory alleged (see *People v. McClennegen* (1925) 195 Cal. 445, 452 . . .), including a theory that necessarily subsumes a lesser offense. The prosecution may, of course, choose to file an accusatory pleading that does

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[8] Indeed, we note that in the 10-plus years since CALCRIM No. 540B was adopted, there has been no suggestion in any case that this instruction, when augmented with the additional language curing any *Pulido* problem, remains deficient in any respect.

[9] Our standard of review as to the trial court's sua sponte duty to instruct is de novo. (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

not allege the commission of a greater offense in a way that necessarily subsumes a lesser offense. But so long as the prosecution has chosen to allege a way of committing the greater offense that necessarily subsumes a lesser offense, and so long as there is substantial evidence that the defendant committed the lesser offense without also committing the greater, the trial court must instruct on the lesser included offense. This allows the jury to consider the full range of possible verdicts supported by the evidence and thereby calibrate a defendant's culpability to the facts proven beyond a reasonable doubt." (*Smith*, at p. 244.)

Instruction on a lesser offense is not required, however, where there is no substantial evidence that only the lesser offense, and not the greater offense, was committed. (*People v. Souza* (2012) 54 Cal.4th 90, 115–116.) " 'Such instructions are required only where there is "substantial evidence" from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense.' " (*People v. Williams* (2015) 61 Cal.4th 1244, 1263.)

The Attorney General does not dispute that the language of the information embraced second degree murder in that it charged Floyd (and Lee) with " 'MURDER, a violation of section 187(a) of the PENAL CODE of California in that on or about July 24, 2013, in the County of Alameda, State of California, said defendant(s) did unlawfully, and with malice aforethought, murder JUDY SALAMON, a human being.' " (See *People v. Gonzalez* (2018) 5 Cal.5th 186, 191, 197–198 (*Gonzalez*) [in robbery felony murder case, accusation triggered duty to instruct on second degree malice murder if there was substantial evidence that defendants committed the lesser, but not the greater, offense]; *People v. Banks* (2014) 59 Cal.4th 1113, 1160 [same].) The Attorney General maintains, however, no substantial evidence supported only a conviction for second degree murder.

Floyd offers a confused argument as to why the record supported instruction on second degree murder. He principally contends the jury could have found that he did not become a participant in the robbery until *after* Lee killed Salamon. He posits three possible scenarios, supported by varying testimony of witnesses, as to when, post-killing,

he "first helped" Lee—when he drove Lee away immediately after Lee shot Salamon, when he made a U-turn and drove back so Lee could get out of the car and take Salamon's phone, or when Lee made a U-turn and drove back so Floyd could get out of the car and take Salamon's phone.

As Floyd points out, none of these proffered scenarios supports a felony-murder conviction. (*Pulido, supra*, 15 Cal.4th at p. 722 ["An accomplice's liability for any homicide committed in furtherance of a 'common purpose' [citation] or 'common design' [citation] of robbery patently does not include a killing that preceded any agreement or intent to participate in the robbery . . . liability does not extend to a homicide completed before the accomplice's participation in the robbery began."].)

But this does not explain why the trial court, according to Floyd, was required to instruct on second degree murder. The only explanation he offers on that point is as follows: "[I]f Floyd assisted the robbery or the murder in some way–perhaps by aiding and abetting a homicide which occurred prior to the robbery; or perhaps by aiding and abetting a robbery, post-shooting, during the asportation phase–but if Floyd did not assist the robbery until after the fatal shooting, then Floyd would have been guilty of something, but he would not have been guilty of first degree felony-murder. However, the jury was not given the opportunity to return any such lesser verdict." This is largely a repeat of his assertion that there was evidence he did not become a participant in the robbery until after the killing, which does not advance his claim that the trial court prejudicially erred in failing to instruct on second degree murder.

However, evidence that a defendant participated in a homicide that occurred separate and apart from a felony, can support instructions on second degree murder. (See *People v. Banks, supra*, 59 Cal.4th at pp. 1160–1161 [evidence of verbal altercation prior to shooting victim using ATM was sufficient to require instruction on second degree murder].)

While Floyd posits he "perhaps" aided and abetted a homicide that occurred prior to the robbery, this is simply speculation, which is insufficient to establish error, let alone

prejudicial error, on the part of the trial court.[10] (See *People v. Banks, supra*, 59 Cal.4th at p. 1161 [while evidence in felony murder case was sufficient to warrant instruction on second degree murder, it was not sufficient "to create a reasonable probability of a different outcome had the instruction been given"; no reasonable jury would have concluded the "defendant shot [the victim] at the ATM out of malice unrelated to any robbery"]; *People v. Romero* (2008) 44 Cal.4th 386, 403–404 [defendant's assertion that he had no intent to take victim's watch until after he shot victim was "so implausible and unlikely" it "would not have merited the jury's consideration"].)

Furthermore, the robbery special circumstance finding *as to Lee*, which Lee has not challenged on appeal, confirms that no prejudicial error occurred, as the jury necessarily found that Salamon was shot *during* a robbery and not prior thereto as Floyd has theorized. (See *Gonzalez, supra*, 5 Cal.5th at p. 200 [a special circumstance finding "renders harmless the failure to instruct on lesser included offenses of murder with malice aforethought"[11]]; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1328 [no prejudicial error in failing to instruct on second degree murder where "the jury found true the allegations that the murder was committed while defendant was engaged in the commission or attempted commission of the crimes of burglary, sodomy, and robbery"], abrogated on other grounds in *People v. Hardy* (2018) 5 Cal.5th 56, 100.)

We further observe that, given the significant changes in the felony-murder law as to aiders and abettors, whether we even need to address Floyd's claim that the trial court erred in failing to instruct on second degree murder is problematic.

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[10] While Floyd asserts the higher *Chapman v. California* (1967) 386 U.S. 18 standard of prejudice applies, the Supreme Court has repeatedly rejected this assertion. (*Gonzalez, supra*, 5 Cal.5th at pp. 198–199.)

[11] In *Gonzalez*, the Supreme Court expressly disapproved *People v. Campbell* (2015) 233 Cal.App.4th 148, in which the appellate court concluded a felony-murder verdict and true special circumstance finding did not render failure to instruct on lesser malice murder offenses harmless under *People v. Watson* (1956) 46 Cal.2d, 818, 836–837. (*Gonzalez, supra*, 5 Cal.5th at pp. 195, 209.)

In his briefing on appeal, Floyd does not identify which theory of second degree murder he claims the trial court failed to submit to the jury—second degree "felony-murder" or second degree malice murder. The Supreme Court explained the differences of the two in *People v. Chun* (2009) 45 Cal.4th 1172 (*Chun*), abrogated in part by Senate Bill Nos. 1437 and 1494 (2017–2018 Reg. Sess.):

> "Murder is divided into first and second degree murder. (§ 189.) 'Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. (§§ 187, subd. (a), 189; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102 . . .)' ([*People v.*] *Hansen* [1994] 9 Cal.4th [300,] 307.) [¶]
>
> ". . . Section 188 defines malice. It may be either express or implied. It is express 'when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.' (§ 188.) It is implied 'when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.' (*Ibid.*) This definition of implied malice is quite vague. . . . Accordingly, the statutory definition permits, even requires, judicial interpretation. We have interpreted implied malice as having 'both a physical and a mental component. The physical component is satisfied by the performance of "an act, the natural consequences of which are dangerous to life." (*People v. Watson* (1981) 30 Cal.3d 290, 300 . . . .) The mental component is the requirement that the defendant "knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life." (*Ibid.*, internal quotation marks omitted.)' (*People v. Patterson* (1989) 49 Cal.3d 615, 626 . . . (lead opn. of Kennard, J.) (*Patterson*).)
>
> "A defendant may also be found guilty of murder under the felony-murder rule. The felony-murder rule makes a killing while committing certain felonies murder without the necessity of further examining the defendant's mental state. The rule has two applications: first degree felony murder and second degree felony murder. We have said that first degree felony murder is a 'creation of statute' (i.e., § 189) but, because no statute specifically describes it, that second degree felony murder is a 'common law doctrine.' (*People v. Robertson* (2004) 34 Cal.4th 156, 166 . . . (*Robertson*).) First degree felony murder is a killing during the course of a felony specified in section 189, such as rape, burglary, or robbery. Second degree felony murder is 'an unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but is not included among the felonies enumerated in section 189. . . .' (*Robertson, supra*, 34 Cal.4th at p. 164.)

> "In *Patterson*, Justice Kennard explained the reasoning behind and the justification for the second degree felony-murder rule: 'The second degree felony-murder rule eliminates the need for the prosecution to establish the mental component [of conscious-disregard-for-life malice]. The justification therefor is that, when society has declared certain inherently dangerous conduct to be felonious, a defendant should not be allowed to excuse himself by saying he was unaware of the danger to life because, by declaring the conduct to be felonious, society has warned him of the risk involved. The physical requirement, however, remains the same; by committing a felony inherently dangerous to life, the defendant has committed "an act, the natural consequences of which are dangerous to life" ([*People v.] Watson, supra*, 30 Cal.3d at p. 300 . . .), thus satisfying the physical component of implied malice.' (*Patterson, supra*, 49 Cal.3d at p. 626.)" (*People v. Chun* (2009) 45 Cal.4th at pp. 1181–1182, fn. & italics omitted.)

Given the stated purposes of the new felony-murder law (Sen. Bill No. 1437 (2017–2018 Reg. Sess.) § 1, subds. (f) & (g)), as well as the specific reference in section 1170.95 to "first degree or second degree murder" (§ 1170.95, subd. (a)(2)), we must conclude the new legislation embraces both first degree and second degree felony murder, thus eliminating the "common law doctrine" of second degree felony murder as to aiders and abettors. Accordingly, to the extent Floyd's failure to instruct claim was predicated on second degree felony murder, such a claim has become moot.

Whether the new legislation has also eliminated second degree malice murder as to defendants who were not the actual killer is unclear. Section 188 continues to specify that malice may be either express or implied. (§ 188, subd. (a)(1) & (2).) It also now specifies, however, that except as provided in section 189, subdivision (e), "in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).)

Section 188, new subdivision (a)(3), thus, implements the Legislature's intent to not only limit aider and abettor felony-murder convictions, but also to eliminate, as to defendants who were not the actual killer, murder convictions based on the natural and probable consequences doctrine. (See Sen. Bill No. 1437 (2017–2018 Reg. Sess.) § 1,

subds. (f) ["It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life."], (g) ["Except as stated in subdivision (e) of Section 189 . . . , a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea."].)

In other words, section 188 new subdivision (a)(3) ensures that, as to a defendant who was not the actual killer, malice can no longer be *inferred* under either the felony-murder rule or the probable and natural consequences doctrine. (Compare *People v. Chiu* (2014) 59 Cal.4th 155, 165 ["Aider and abettor liability under the natural and probable consequences doctrine does not require assistance with or actual knowledge and intent relating to the nontarget offense, nor subjective foreseeability of either that offense or the perpetrator's state of mind in committing it."], abrogated in part by Sen. Bill Nos. 1437 & 1494 (2017–2018 Reg. Sess.); *Chun, supra*, 45 Cal.4th at p. 1184 [" 'The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to human life.' "].)

Rather, the prosecution would now have to prove that a defendant who was not the actual killer acted with express or implied malice in his or her own right, in helping to commit the murder. (See *People v. Canizalez* (2011) 197 Cal.App.4th 832, 842–844 (*Canizalez*) [generally discussing second degree malice murder and affirming convictions based on implied malice where defendants engaged in drag racing that ended in a four-car collision, with one car becoming engulfed in flames, killing a mother and her two children].)

Malice is implied, explained *Canizalez*, "when ' " 'the killing proximately resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.' " ' [Citation.] Implied malice requires that the defendant act with a wanton disregard for the high probability of death

([citation]), thereby requiring a subjective awareness of a high degree of risk. ([Citation.]) It is not enough that a reasonable person would have been aware of the risk. ([Citation.]) Malice may be inferred from the circumstances of the murder." (*Canizalez, supra,* 197 Cal.App.4th at p. 842, italics omitted.)

Thus, while implied malice is similar to the natural and probable consequences doctrine, it is not the same. Implied malice requires that the state prove beyond a reasonable doubt that the defendant was *subjectively aware* that his or her own conduct endangered human life and nevertheless consciously and deliberately engaged in such conduct. (See *People v. Superior Court* (*Costa*) (2010) 183 Cal.App.4th 690, 697 ["Implied malice is determined by examining the defendants subjective mental state to see if he or she actually appreciated the risk of his or her actions."].)

We need not decide, however, whether second degree malice murder survives as to a defendant who was not the actual killer. Even assuming it remains a viable theory as to a defendant who was not the actual killer, Floyd has not, as we have discussed above, made a sufficient showing such instruction was warranted under the evidence, and he manifestly cannot show that any failure to instruct was prejudicial.

Accordingly, the trial court did not prejudicially err in failing to sua sponte instruct on second degree murder.

Sufficiency of the Evidence:

Robbery-Murder Special Circumstance Finding

To find robbery-murder special circumstances true as to Floyd, an aider and abettor, the jury was required to find either that he (a) intended to kill Salamon and assisted in her murder *or* (b) was a "major participant" in the robbery and acted "with reckless indifference to human life." (§ 190.2, subd. (d); *Clark, supra,* 63 Cal.4th at pp. 610–623; *Banks, supra,* 61 Cal.4th at pp. 804–810.) The prosecutor proceeded solely

on the latter theory—that Floyd was a "major participant" in the robbery and acted "with reckless indifference to human life."[12]

Floyd contends the evidence does not support either determination, citing to *Clark, supra*, 63 Cal.4th 522, *Banks, supra*, 61 Cal.4th 788, and *In re Miller* (2017) 14 Cal.App.5th 960 (*Miller*). Rather, Floyd maintains he was merely the "getaway driver" and therefore cannot constitutionally suffer the severe punishment that follows from a special circumstance finding.[13]

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[12] Accordingly, the jury was instructed in accordance with CALCRIM No. 703, which states in pertinent part:

> "If you decide that Mario Floyd is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstance[] of robbery, you must decide whether the defendant acted either with intent to kill or with reckless indifference to human life.
>
> "In order to prove this special circumstance for a defendant who is not the actual killer but who is guilty of first degree murder as an aider and abettor, the People must prove either that the defendant intended to kill or the People must prove all of the following:
>
> 1. The defendant's participation in the crime began before or during the killing;
> 2. The defendant was a major participant in the crime; AND
> 3. When the defendant participated in the crime, he acted with reckless indifference to human life."

[13] Our standard of review as to sufficiency of the evidence is well-established: We independently examine the record in the light most favorable to the prosecution to determine whether substantial evidence supports a special circumstance finding. (*Banks, supra*, 61 Cal.4th at p. 804.) Substantial evidence is " ' "evidence which is reasonable, credible, and of solid value" ' " sufficient to support a finding beyond a reasonable doubt. (*Ibid.*) We must also accept logical inferences the jury could have drawn from the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) However, a reasonable inference " ' "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." ' " (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1416, disapproved of on other grounds in *People v. Farwell* (2018) 5 Cal.5th 295, 304, fn. 6.)

This court recently summarized the special circumstances law pertaining to aiders and abettors in *In re Taylor* (2019) 34 Cal.App.5th 543 (*Taylor*), and we quote our discussion of the two pivotal cases on which Floyd relies, *Banks* and *Clark*:

> "As our state Supreme Court observed in *Banks*, '[s]ection 190.2(d) was designed to codify the [United States Supreme Court's] holding [in] *Tison* . . . , which articulates the constitutional limits on executing felony murderers who did not personally kill. *Tison* and a prior decision on which it is based, *Enmund v. Florida* (1982) 458 U.S. 782 . . . [(*Enmund*)], collectively place conduct on a spectrum, with felony-murder participants eligible for death only when their involvement is substantial and they demonstrate a reckless indifference to the grave risk of death created by their actions.' (*Banks, supra*, 61 Cal.4th at p. 794.) *Banks* concluded that section 190.2(d) 'must be accorded the same meaning' as the principle discussed in *Tison* and *Enmund* and 'must be given the same interpretation irrespective of whether the defendant is subsequently sentenced to death or life imprisonment without parole.' (*Banks*, at p. 794.) In other words, although *Tison* and *Enmund* addressed only the Eighth Amendment's limitations on the death penalty, those decisions also govern the interpretation of section 190.2(d) under state law. (See *Banks*, at p. 804.)
>
> "Beginning with the principle that 'in capital cases above all, punishment must accord with individual culpability,' *Banks* explained that the death penalty cannot be imposed based solely on a defendant's 'vicarious responsibility for the underlying crime.' (*Banks, supra*, 61 Cal.4th at p. 801.) Rather, to be sentenced to death, a defendant must, compared to 'an ordinary aider and abettor to an ordinary felony murder,' have both a more culpable mind state—reckless indifference to the risk of death—and more substantial involvement—as a major participant. (*Id*. at pp. 801–802.) Because the United States Supreme Court had 'found it unnecessary to "precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty," ' *Banks* concluded that 'a jury presented with this question must consider the totality of the circumstances.' (*Banks*, at p. 802. . . .) Accordingly, *Banks* closely examined the facts in *Enmund* and *Tison* '[t]o gain a deeper understanding of the governing test and offer further guidance.' (*Banks*, at p. 801.)
>
> "In *Enmund*, the defendant learned that a man 'was in the habit of carrying large sums of cash on his person. A few weeks later, [the defendant] drove two armed confederates to [the man's] house and waited nearby while they entered. When [the man's] wife appeared with a gun, the confederates shot and killed [the couple]. [The defendant] thereafter drove his confederates away from the scene and helped dispose of the murder weapons, which were never found.' (*Banks*,

supra, 61 Cal.4th at p. 799.) The United States Supreme Court reversed the death sentence, concluding that the Eighth Amendment barred such punishment 'for any felony-murder aider and abettor "who does not himself [or herself] kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." ' (*Banks,* at p. 799.)

"In *Tison*, the defendants 'helped plan and carry out the escape of two convicted murderers from prison,' one of whom had killed a guard during a previous escape. (*Banks, supra,* 61 Cal.4th at p. 802.) 'This entailed [the defendants'] bringing a cache of weapons to prison, arming both murderers, and holding at gunpoint guards and visitors alike.' (*Ibid*.) During the escape, the defendants robbed and held at gunpoint an innocent family 'while the two murderers deliberated whether the family should live or die,' and the defendants 'then stood by' while the murderers shot all four family members. (*Ibid*.) The United States Supreme Court affirmed the death sentences, holding that ' "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." ' (*Id*. at p. 800.)

"Comparing the facts in *Enmund* with those in *Tison*, *Banks* derived a nonexclusive list of factors bearing on whether an aider and abettor of felony murder was a 'major participant' under section 190.2(d): ' "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?" ' (*Clark, supra,* 63 Cal.4th at p. 611. . . .)

"Applying these factors, *Banks* held there was insufficient evidence that the defendant in the case before it was a major participant in the underlying robbery. (*Banks, supra,* 61 Cal.4th at p. 805.) The evidence showed that the defendant had 'dropped his confederates off near [a marijuana] dispensary' and 'waited three blocks away for approximately 45 minutes.' (*Id*. at pp. 795, 805. . . .) After a security guard attempted to stop the robbers, all of whom were armed, one of them shot and killed him. (*Id*. at p. 795.) The defendant then headed toward the dispensary, picked up the other two nonshooters, and drove them away. (*Id*. at pp. 795–796, 805.) Our state Supreme Court concluded that the defendant was 'at the *Enmund* pole of the *Tison-Enmund* spectrum,' as there was no evidence that he planned the robbery or procured weapons, knew the shooter had previously committed a violent crime, or was present at the scene or even aware that a shooting had occurred. (*Id*. at p. 805.) The court also concluded that the

defendant had not exhibited reckless indifference to human life, emphasizing that a defendant's knowing participation in an armed robbery and subjective awareness of 'the risk of death inherent in [that crime]' does not suffice. (*Id.* at pp. 807–808.) Rather, a defendant must appreciate that his or her 'own actions would involve a grave risk of death.' (*Id.* at p. 807.)

"*Clark* expounded on the meaning of the 'reckless indifference to human life' element of a special circumstance under section 190.2(d), which ' "significantly overlap[s]" ' with the 'major participant' element. (*Clark, supra*, 63 Cal.4th at pp. 615, 614. . . .) *Clark* explained that the mind state 'encompasses a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his [or her] actions.' (*Clark*, at pp. 616–617.) The required intent has 'both subjective and objective elements. The subjective element is the defendant's conscious disregard of risks known to him or her. But recklessness is not determined merely by reference to a defendant's subjective feeling that he or she is engaging in risky activities. Rather, recklessness is also determined by . . . what "a law-abiding person would observe in the actor's situation." ' (*Id.* at p. 617.) As *Banks* did as to the 'major participant' element, *Clark* provided a nonexclusive list of factors bearing on the 'reckless indifference to human life' element. (*Clark*, at p. 618.) These factors are the 'defendant's knowledge of weapons used in the crime, and their actual use and number; [the] defendant's proximity to the crime and opportunity to stop the killing or aid [the victim or victims]; the duration of the crime; [the] defendant's knowledge of [the actual killer's] propensity to kill; and [the] defendant's efforts to minimize the possibility of violence during the crime.' (*Miller, supra,* 14 Cal.App.5th at p. 975. . . .)

"Applying these factors to the facts, *Clark* concluded there was insufficient evidence that the defendant had acted with reckless indifference to human life. (*Clark, supra*, 63 Cal.4th at p. 623.) As summarized by a later decision, the *Clark* defendant ' "was the mastermind who planned and organized [an] attempted robbery [of a computer store] and who was orchestrating the events at the scene of the crime." [Citation.] During the robbery, one of [the defendant's] accomplices . . . shot and killed the mother of a store employee who arrived at the store to pick up her son. At the time of the shooting, [the defendant] was not at the store, but he drove to the location shortly thereafter and fled when he saw a woman lying on the ground, the police approaching, and [the shooter] fleeing the scene.' (*Bennett, supra,* 26 Cal.App.5th at pp. 1014–1015. . . .) Despite the evidence of the defendant's significant involvement in planning the robbery, there was also evidence that he 'planned the crime with an eye to minimizing the possibilities for violence,' because it was timed for after the store closed and there were not supposed to be bullets in the gun. (*Clark*, at pp. 621–623.) The court concluded that the special circumstance had to be vacated since 'nothing in the plan . . .

elevated the risk to human life beyond those risks inherent in any armed robbery.' (*Id*. at p. 623.)" (*Taylor, supra*, 34 Cal.App.5th at pp. 551–554.)

We need not, and do not, address the sufficiency of the evidence to establish that Floyd was a "major participant" in the robbery, since we conclude, for reasons we shortly explain, the evidence is not sufficient to establish that he acted with "reckless indifference to human life" as that requirement has been explicated in *Banks* and *Clark*. We observe, however, there is substantial evidence Floyd was far more than a "getaway driver," including evidence that he made the first demand that Salamon turn over her cell phone, that he threatened her in doing so, that after he failed to obtain the phone he had words with Lee indicating Lee intended to get the phone by other means, that he was in the immediate vicinity when Lee shot Salamon, that he remained in the car as Lee drove away, that within short order Lee made a U-turn and drove back to Salamon's car, that Floyd hopped out of the car and took the phone from Salamon's hand, and after he got back into Lee's car, the two of them fled.

While Floyd had substantial involvement in the crime, we nevertheless conclude the evidence is not sufficient under *Banks* and *Clark* to establish that he acted with "reckless indifference to human life." We therefore turn to the factors bearing on "reckless indifference" identified and elaborated on in *Clark.*

Knowledge of weapons used in the crime.

There is no evidence Floyd supplied the gun Lee used to kill Salamon. There also is no evidence that Floyd knew Lee had a gun with him. While Rutherford testified "[e]verybody" knew everyone had a gun, it is doubtful that generalized testimony, even by Rutherford, is sufficient to show the specific knowledge required by *Banks* and *Clark*.

Knowledge of Lee's propensity to kill.

There also is no evidence Floyd knew anything about Lee's criminal history, and, specifically no evidence he knew Lee had threatened to kill or killed before.[14]

[14] We note the information alleged Lee had prior convictions for robbery and felon in possession of a firearm.

Proximity to the crime.

As we have recited, there is abundant evidence Floyd was present at every stage of the crime, from the initial demand and threats to Salamon to force her to relinquish her cell phone, to the shooting, to the actual procurement of the phone by reaching in through the shattered window of Salamon's car and snatching it out of her hand as she was bleeding.

Opportunity to stop the killing or aid the victim.

Given that one witness stated Lee was driving his car when he took aim at Salamon through the passenger side window, Floyd, sitting in the passenger seat, may have had an opportunity to deflect the shot. But this is largely speculation. Other witnesses testified Lee was out of his car when he shot Salamon and Floyd did not get back in the car until after the fatal shots. Floyd did, however, have not one, but two opportunities to aid Salamon. He could have called, even anonymously, for emergency aid immediately after the shooting; instead, he and Lee drove away from the scene. He also could have called for assistance when he and Lee doubled-back to take the phone from Salamon as she sat bleeding in her car; instead, the two fled.

Duration of the crime.

Clark explained this factor is relevant because "[w]here a victim is held at gunpoint, kidnapped, or otherwise restrained in the presence of perpetrators for prolonged periods, 'there is a greater window of opportunity for violence' [citation], possibly culminating in murder." (*Clark, supra,* 63 Cal.4th at p. 620.) Here, while the crime might be called a "slow" or multi-stage robbery, there is no evidence Salamon was restrained by Lee and Floyd for any prolonged period, heightening the risk she would be murdered.

A number of cases have distinguished situations where "the struggle and ensuing shooting happened almost immediately" and have overturned "special circumstances, including *Banks* and *Clark*, [where] the evidence tended to show that the shooting was a 'somewhat impulsive' response to the victim's unexpected resistance, as opposed to the culmination of a prolonged interaction that increased the opportunity for violence."

(*Taylor, supra*, 34 Cal.App.5th at p. 558.) The instant case does not fall neatly into that category, as there is no evidence Lee shot as an impulsive reaction to meeting unexpected resistance or being pursued. Rather, there is abundant evidence Lee decided to kill Salamon after Floyd failed to obtain the phone by threat, and that he (Lee) deliberately approached her (by car or on foot, depending on which witness was testifying), took aim at her head and fired three times. In other words, this was not a reactionary killing; it was calculated, deliberate murder.

Efforts to minimize violence.

There is no evidence Floyd made any effort to minimize violence. In fact, there is substantial evidence to the contrary. There is evidence he was the first to accost and threaten Salamon in an attempt to force her to hand over her phone. There is evidence one of the witnesses, Jordan, realized the situation was escalating and told Floyd to leave Salamon alone and go into Jordan's residence to cool off. And there is evidence that after Floyd initially failed to get the phone from Salamon, Lee made it clear he (Lee) was not done with the matter and intended to get her phone by other means. Floyd made no attempt to head off any further trouble, but instead joined Lee in the car and was present as the rest of the events unfolded. In short, Floyd not only made no effort to minimize violence, he affirmatively refused do so and contributed to inflaming the situation.

Accordingly, in this case, some of the *Clark* factors support a finding of "reckless indifference to human life" and others do not. We cannot conclude, however, in light of *Banks* and *Clark*, that, on balance, the evidence is sufficient to constitutionally subject Floyd to the death penalty, which, in final analysis, is the grounding principle of these cases. Accordingly, we conclude the special circumstances finding as to Floyd must be vacated.

The Felony-Murder Conviction

Having concluded the special circumstance finding as to Floyd must be reversed for insufficient evidence of "reckless indifference to human life," we next consider the consequences of that determination on Floyd's felony-murder conviction. As we have stated, the felony-murder law applicable to aiders and abettors has changed significantly

since Floyd was convicted, and there is no dispute these changes apply to Floyd. (*People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147 (*Anthony*).)

That law, through the enactment of Senate Bill No. 1437 (2017–2018 Reg. Sess.), now limits felony murder convictions to a defendant who was either (a) the actual killer, *or* (b) was not the killer, but had the intent to kill and assisted in the killing, *or* (c) "was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e)(3); Stats. 2018, ch. 1015, § 3.) Thus, as Floyd points out, the findings formerly required only for a special circumstance finding as to an aider and abettor, are now required for an aider and abettor felony-murder conviction. (Compare §§ 189, subd. (e) & 190.2, subd. (d).)

Floyd maintains he has a right to appeal his felony-murder conviction and therefore is entitled to have this court determine whether it can stand under the current law. He further maintains that if we conclude the special circumstances finding is not supported by substantial evidence, that necessarily means under the new felony-murder law the evidence is also insufficient to support his felony-murder conviction. He therefore concludes we would be required, under the new law, to reverse his felony-murder conviction and remand the matter for resentencing on the underlying felony, robbery. (§ 1170.95, subds. (a), (d)(1), (e) [if a defendant successfully petitions trial court to vacate a felony-murder conviction, court must "resentence the petitioner on any remaining counts . . . as if the petitioner had not been previously [] sentenced," or if the target felony offense was not charged, the conviction "shall be redesignated as the target offense or underlying felony for resentencing purposes"].)

The Attorney General maintains Floyd must pursue the petitioning process set forth in section 1170.95 in order to have his felony-murder conviction vacated and be sentenced on the underlying felony. Otherwise, the prosecution will be deprived of its right to oppose resentencing. (§ 1170.95, subd. (d).) The Attorney General points out the new statute expressly allows the prosecution to "offer new and additional evidence" to show a defendant is not entitled to relief from a felony-murder conviction. (§ 1170.95, subd. (d)(3).)

This court recently addressed the section 1170.95 petitioning process in *In re Taylor*. "[S]ection 1170.95, which allows those 'convicted of felony murder . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts.' (§ 1170.95, subd. (a).) Before such a petition may be filed, the following three conditions must be met: '(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder. . . . [¶] (2) The petitioner was convicted of first degree [murder] or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted [of] first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.' (§ 1170.95, subd. (a)(1)–(3).)" (*Taylor, supra,* 34 Cal.App.5th at pp. 561–562.)

"Upon receiving a petition that is supported by the petitioner's declaration that all three conditions are met and that makes a 'prima facie showing that the petitioner falls within the provisions of [section 1170.95],' the sentencing court must issue an order to show cause. (§ 1170.95, subd. (c).) It must then 'hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts.' (§ 1170.95, subd. (d)(1).) Should they wish, '[t]he parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner.' (§ 1170.95, subd. (d)(2).) If, however, a hearing occurs, 'the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. . . . The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.' (§ 1170.95, subd. (d)(3).)" (*Taylor, supra,* 34 Cal.App.5th at p. 562.)

As *Taylor* indicates, the appellate courts have concluded that both defendants whose convictions are final (and thus are seeking habeas relief) and those who

convictions are not final (and thus are challenging their convictions on direct appeal) must proceed by way of the petitioning process in section 1170.95. (*Taylor*, *supra*, 34 Cal.App.5th at p. 562; *Anthony*, *supra*, 32 Cal.App.5th at pp. 1147–1158; *People v. Martinez* (2019) 31 Cal.App.5th 719, 724–729.) Thus, in *Taylor*, although the evidence was insufficient to support the aider and abettor robbery special circumstance finding, this court concluded "the more efficient course" with respect to the felony-murder conviction was for the defendant "to seek to overturn his [felony] murder conviction by filing a section 1170.95 petition in the superior court." (*Taylor*, at p. 562.)

We take the same approach here. As the court in *Anthony* observed, " '[t]he right to appeal and the right to pursue recall and resentencing are both statutory.' " (*Anthony*, *supra*, 32 Cal.App.5th at p. 1147.) Accordingly, in directing Floyd to his new statutory remedy to challenge his felony-murder conviction and obtain resentencing on the underlying felony, we are not abridging any constitutionally ensconced appellate right.

"Once any such petition is filed, the parties will have the opportunity to address the effect of our holding [as to the special circumstance finding] on [Floyd's] entitlement to relief under Senate Bill No. 1437, an issue on which we express no opinion."[15] (*Taylor*, *supra*, 34 Cal.App.5th at p. 562.)

Issues Raised By Lee

Instructional Ruling: Failure to Instruct on Second Degree Murder

Lee, like Floyd, claims the trial court erred in not instructing sua sponte on second degree malice murder. However, unlike Floyd, Lee, who was the actual killer, does not challenge the sufficiency of the evidence to support the robbery special circumstance finding as to him.

As we have discussed, the Attorney General acknowledges that under the accusatory pleading test, the trial court had an obligation to instruct on second degree malice murder "if there was substantial evidence that [Lee] committed the lesser, but not

[15] Given our disposition of the issues Floyd has raised on appeal, we need not, and do not, address his final claim that "collectively" the trial court's asserted errors require reversal.

the greater offense, supporting such instructions." (*Gonzalez, supra*, 5 Cal.5th at p. 197.) He maintains, however, that there was no such evidence, and therefore the court did not err in failing to instruct on the lesser crime.

Lee claims otherwise, asserting there was evidence from which a reasonable jury could have found that he shot Salamon "with malice in the course of an argument or fight and not necessarily during the commission of a robbery." While acknowledging Rutherford's testimony "presented a strong case that the shooting was committed during the commission of a robbery," he claims Jordan's testimony "permitted the inference" the shooting had nothing to do with procuring Salamon's cell phone and, instead, was the fallout of an argument that started with Floyd and soon included Lee. He claims Jude's testimony, in turn, "permitted the inference" that taking Salamon's cell phone was "an afterthought," unrelated to the murder. He thus concludes that under either Jordan's or Jude's "version of events," a jury could have reasonably concluded "the shooting was not committed for the purpose of or during the commission of a robbery and instead constituted second degree [malice] murder."

We need not decide, however, whether substantial evidence supported an instruction on second degree malice murder. Even assuming there was sufficient evidence to warrant such an instruction, the special circumstance finding, which Lee does not challenge, renders harmless any error in failing to instruct on second degree malice murder. (*Gonzalez, supra*, 5 Cal.5th at pp. 191, 200; *Castaneda, supra*, 51 Cal.4th at pp. 1327–1329 [no need to decide whether substantial evidence supported instruction on second degree murder because special circumstance finding established jury would have convicted defendant of felony-murder regardless of instruction on second degree murder].)

In his briefing on appeal, completed before the Supreme Court decided *Gonzalez*, Lee acknowledged California courts had applied the *Watson* standard in reviewing claims of failure to instruct on a lesser offense. Nevertheless, he urged this court to view such error as implicating federal constitutional concerns, requiring prejudice to be evaluated under the *Chapman* standard. In *Gonzalez*, however, the high court definitively ruled to

the contrary, explaining that failure to instruct on a lesser offense is not error of federal constitutional dimension, nor is it "structural" error under state law requiring reversal per se. Rather, failure to instruct on a lesser offense is subject to harmless error review under the *Watson* standard, i.e., whether it is " ' "reasonably probable that a result more favorable to the appealing party would have been reached in absence of the error." ' "[16] (*Gonzalez, supra,* 5 Cal.5th at pp. 195–196.) We, of course, are bound by this holding.

Lee also acknowledged in his briefing that there was case law "purporting to hold that a true finding on a felony-murder special circumstance" renders harmless any error in failing to instruct on a lesser crime. He urged this court to reach a different conclusion based on *Campbell, supra,* 233 Cal.App.4th 148, in which the Court of Appeal concluded a "guilty verdict on felony murder and true finding on a robbery-murder special-circumstance [did] not render the failure to instruct on lesser included offenses of murder with malice aforethought harmless under *Watson.*" (*Gonzalez, supra,* 5 Cal.5th at p. 195.) In his reply brief, Lee acknowledged the Court of Appeal in *Gonzalez* had disagreed with and reached a different conclusion than the court in *Campbell*. He maintained the *Gonzalez* court had incorrectly analyzed the issue and pointed out the Supreme Court had, at that point, granted review. He therefore continued to urge that we adopt the approach taken in *Campbell.*

As we have observed, however, the Supreme Court endorsed the approach in *Gonzalez* and rejected the approach in *Campbell.* (*Gonzalez, supra,* 5 Cal.5th at pp. 200–206.) Indeed, the Supreme Court pointed out its holding on this point was well grounded in the court's prior case law that had "establish[ed] that a true felony-murder special-circumstance finding can render such error [failure to instruct on a lesser crime] harmless." (*Id.* at p. 200.) In *Castaneda,* for example, which the Supreme Court cited as illustrative in *Gonzalez* (*id.* at p. 200), the high court had held that even assuming

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[16] The court distinguished failure to instruct on a lesser offense from failure to instruct "on an element of an offense." (*Gonzalez, supra,* 5 Cal.5th at pp. 198–199.) The latter error is of constitutional dimension "because a jury must find the defendant guilty of every element of the crime of conviction beyond a reasonable doubt." (*Ibid.*)

substantial evidence supported an instruction on second degree murder, failure to instruct on the lesser crime was harmless "because the jury found true the allegations that the murder was committed while defendant [who committed the murder] was engaged in the commission of or attempted commission of the crimes of burglary, sodomy, and robbery." (*Castaneda, supra*, 51 Cal.4th at p. 1328.) "Because 'the elements of felony murder and the special circumstance[s] coincide, the true finding[s] as to the . . . special circumstance[s] establish[] here that the jury would have convicted defendant of first degree murder under a felony-murder theory, at a minimum, regardless of whether more extensive instructions were given on second degree murder.' " (*Ibid.*)

The Supreme Court reiterated this proposition in *Gonzalez:* "[S]uch a finding necessarily demonstrates the jury's determination that the defendant committed felony murder rather than a lesser form of homicide. [Citations.] Such a finding therefor renders harmless the failure to instruct on lesser included offenses of murder with malice aforethought and the associated prejudice created by an all-or-nothing choice." (*Gonzalez, supra*, 5 Cal.5th at p. 200.)

We observe that in *Gonzalez*, the Supreme Court pointed not only to the special circumstance finding against the defendant who actually killed the victim, but also to the special circumstances findings against the two aider and abettor defendants which required findings "above and beyond what was necessary for the felony-murder conviction." (*Gonzalez, supra*, 5 Cal.5th at p. 202.) The high court did not suggest, however, that in the absence of a special circumstance finding as to an aider and abettor, a special circumstance finding as to the defendant who actually perpetrated the murder will not suffice to render harmless any error in failing to instruct on second degree malice murder. On the contrary, the high court reaffirmed its holding in *Castaneda* (*Gonzalez,* at p. 200), for example, which involved only one defendant who perpetrated the murder in the course of committing numerous felonies. (*Castaneda, supra*, 51 Cal.4th at p. 1302.)

Since Lee has not challenged the sufficiency of the evidence to support the special circumstance finding against him, we conclude he has not, and cannot, demonstrate

prejudicial error under *Watson*, even assuming the trial court had a sua sponte to instruct on the lesser crime of second degree malice murder.

Sentencing Enhancement

The trial court sentenced Lee to life without parole for first degree murder and an additional term of 25 years to life for discharging a firearm resulting in death under section 12022.53, subdivision (d). The court stayed three additional enhancements, for inflicting great bodily injury while committing a felony under section 12022.7, subdivision (a), using a firearm during the commission of a felony under section 12022.53, subdivision (b), and discharging a firearm during the commission of a felony under section 12022.53, subdivision (c).

At the time Lee was sentenced, imposition of the section 12022.53, subdivision (d) enhancement was mandatory. The law changed, however, on January 1, 2018, and under amended section 12022.53, subdivision (h), a sentencing court now has discretion "in the interest of justice pursuant to Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section."

There is no dispute this change applies retroactively, and Lee therefore asks that the matter be remanded so the trial court can choose whether to exercise its discretion under the amended statute.

The Attorney General maintains remand is not warranted because the record makes it clear the trial court would not have struck the enhancement even if it had had the discretion to do so. In explaining its sentence, the court stated it did not think "anybody [could] dispute or deny . . . the barbarity of what occurred. [¶] . . . Anybody who looks at these facts as to what happened to [the victim] out there on that day and tries to reconcile what happened to her with notions of what does or doesn't occur in a civilized society would have a hard time even coming close to understanding how or why anyone could engage in this kind of conduct. It is beyond—to say that it is beyond the pale—is a gross understatement."

While the trial court used strong language in condemning the defendants' conduct, and we have serious doubt the court would have struck the enhancement had it believed it

had the discretion to do so, the majority of cases that have considered the propriety of a limited remand, including this court, have come to the conclusion that where a trial court has never considered the exercise of discretion it has newly acquired, an appellate court should not, in the absence of extraordinary circumstances, hazard a guess as to how such discretion would have been exercised. (E.g., *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427.) We therefore will order a limited remand.

DISPOSITION

The special circumstance finding as to Floyd is vacated. In all other respects, the judgment as to Floyd is affirmed. The judgment as to Lee is also affirmed, although we remand to the trial court to decide whether to exercise its discretion under section 12022.53, subdivision (h), as amended by Senate Bill No. 620 (2017–2018 Reg. Sess.), to strike the firearm enhancement, and, if the trial court decides to do so, to resentence Lee accordingly.

_____
Banke, J.

We concur:

_____
Humes, P.J.

_____
Sanchez, J.